

## Reflections on the Rise and Fall of the Arbitration and Mediation Services (Equality) Bill

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### Legislation:

#### [Arbitration and Mediation Services \(Equality\) Bill](#)

Baroness Cox's six-year campaign to address the plight of British Muslim women was dealt a mighty blow on 11 March 2016. The date had marked a historic occasion for Cox and her supporters. Her private member's bill had been scheduled to receive its first ever debate in the House of Commons, after failing to pass through the House of Lords four times in a row since it was first introduced in 2011. Due to a busy parliamentary timetable, however, it was not discussed. In light of the current public review of Shariah tribunals (the first ever of its kind), it is a pertinent opportunity to reflect on the rise and fall of Cox's bill since its introduction in 2011, particularly since it has been reintroduced for the 6<sup>th</sup> consecutive time in the current parliamentary session.<sup>1</sup>

### The Nature and Function of Private Members' Bills

The Arbitration and Mediation Services (Equality) Bill is a private member's bill first introduced by Baroness Cox in 2011 which concerns religious tribunals in general and Shariah tribunals in particular. Before embarking upon an analysis of the bill, it is first necessary to clarify the nature of private members' bills, so that the long political process which Baroness Cox's bill has had to undergo since 2011 can be properly understood.<sup>2</sup> Most successful bills are those which are introduced and promoted by the government of the day.<sup>3</sup> A private member's bill is one promoted by an individual Member of Parliament, as opposed to the government.<sup>4</sup> Such bills usually involve sensitive issues of particular interest to their promoters.<sup>5</sup> Only a very small minority of Private Members' Bills actually reach the statute book. This is because they are allocated a very minimal amount of time in the parliamentary time-table. The only way that they can realistically succeed is for the government to make additional time for such bills to complete their parliamentary stages.<sup>6</sup>

In practice therefore, a private member's will not get through without the support, or at least the "benevolent neutrality" of the government.<sup>7</sup> Moreover a bill which is introduced in the House of Lords has an even smaller chance of success.<sup>8</sup> This is because most Private Members' Bills are introduced in the House of Commons, and bills introduced in the Lords will only be considered after Bills introduced in the Commons.<sup>9</sup> These bureaucratic hurdles explain why Baroness Cox's bill has failed to reach the House of Commons four times consecutively since 2011, with the bill finally breaking through in the 2015-2016 parliamentary session after Baroness Cox had reintroduced the bill in the House of Lords for the fifth year in a row. In three of these four failed attempts, the bill did not even manage to receive a second reading, which is usually the point at which the bill is debated by the house for the first time and inspected by the government.<sup>10</sup>

## **The Academic and Political Background of Baroness Cox**

Baroness Cox is described by a fellow House of Lords member as a “rare breed”.<sup>11</sup> A qualified nurse with degrees in both sociology and law, Cox has enjoyed a successful career in academia and politics, authoring several books spanning a range of topics including religion, law, politics and sociology. As president of Christian Solidarity Worldwide she became renowned for leading humanitarian campaigns in conflict zones such as Armenia, Sudan, Nigeria and Indonesia, earning her the title “a voice for the voiceless”.<sup>12</sup> The bill in question is in fact the result of another campaign which the Baroness has personally taken upon herself, this time addressing the plight of British Muslim women whose suffering she believes would “make the suffragettes turn in their graves.”<sup>13</sup> From a broader perspective, the bill is also an attempt by Cox to stem what she describes as “the creeping implementation of Sharia law in this country”.<sup>14</sup> These two factors were highlighted by Cox as forming the central rationale of the bill:

“I’m bringing this Bill before Parliament for four reasons. First because in this country we have a commitment to equality [and] to combat any forms of gender discrimination, gender inequality, and Shari’a law is inherently discriminatory against women, so it does not actually have a place in this country, in family matters particularly. Secondly, women are really suffering as a result of the provisions of Shari’a law, for example polygamy. In Shari’a law a man can divorce a wife very easily. This happens quite frequently. Women are just divorced, and left, if they haven’t had a civilly registered marriage, without any legal redress. The husband goes and marries another wife, brings her back to this country, and enjoys that relationship, and divorce again. And then a third marriage, a third divorce. We don’t allow bigamy in this country, why are we allowing polygamy, and women are suffering, and that’s the second point.”<sup>15</sup>

Despite this particular rationale, the bill’s actual text makes no explicit mention of Shariah tribunals or Islamic law. It is instead framed as a provision about mediation and arbitration services in general, with the particular aim of ensuring that such services conform to equality legislation.

## **The Provisions of the Bill**

The bill begins with the following introduction:

“A bill to make further provision about arbitration and mediation services and the application of equality legislation to such services; to make provision about the protection of victims of domestic abuse; and for connected purposes.”<sup>16</sup>

The focus on arbitration and mediation services is based on Baroness Cox’s belief that the central problem with Shariah tribunals is their abuse of the Arbitration Act 1996. This is being done according to Baroness Cox in several ways. Some tribunals like the Muslim Arbitration Tribunal “are operating legitimately” under the Arbitration Act, but are “operating discriminatory procedures during the proceedings.”<sup>17</sup> Thus for example the resolution of inheritance disputes in the Muslim Arbitration Tribunal is based on the premise that a woman deserves half the inheritance of the man.<sup>18</sup> Other “arbitration” tribunals such as the Islamic Shariah Council are operating outside the framework of the Arbitration Act by deciding cases relating to family law and criminal law.<sup>19</sup> Shariah tribunals are also abusing their powers under the Arbitration Act by “coercing Muslim women into

agreeing arbitration" when the arbitration process ought in fact to be a voluntary process with consent from both parties.<sup>20</sup>

The bill is split up into five main parts. Part one makes amendments to the Equality Act 2010 with the purpose of ensuring in the words of Baroness Cox "that tribunals operating legitimately under the Arbitration Act 1996 cannot use discriminatory Shariah rules such as a woman's testimony being worth half that of a man."<sup>21</sup> To this end Part 1 inserts a subsection into the Equality Act which specifically outlaws arbitration services which "proceed on the assumption that a woman has fewer property rights than a man."<sup>22</sup> Part 1 also places a duty on public authorities to ensure that Muslim women in polygamous households or religious marriages are made aware of their legal rights. This duty is based on Baroness Cox's concern that Muslim women are unaware of the legal protections provided by the civil registration of marriage and suffer as a consequence.<sup>23</sup> Part 2 makes amendments to the Arbitration Act 1996 which simply affirm the amendments made in Part 1, namely that an Arbitration Agreement cannot contain a term which provides that women should have fewer property rights than men. Part 3 makes amendments to the Family Law Act 1996 which enhance a judge's power to set aside court orders based on negotiated agreements in which "one party's consent was not genuine".<sup>24</sup> These amendments target the issue of consent in agreements drafted by Shariah tribunals in which the Muslim woman's consent "is open to serious challenge".<sup>25</sup> In this regard Part 3 also empowers third parties to apply for the court order to be struck down, so that "even women who do not dare take this step themselves can be protected."<sup>26</sup>

Part 4 makes an amendment to the Criminal Justice and Public Order Act 1994 which emphasises that a victim of domestic abuse is a witness to an offence and therefore should be protected from intimidation. This is designed to protect Muslim women who come forward to report domestic abuse which they are suffering.<sup>27</sup> Part 5 makes an amendment to the Courts and Legal Services Act 1990 which creates a new legal offence of "falsely claiming legal jurisdiction".<sup>28</sup> This is aimed to prevent Shariah tribunals from claiming legal jurisdiction in disputes outside the remit of the Arbitration Act such as family and criminal disputes.<sup>29</sup> The maximum penalty for committing such an offence is set as seven years.<sup>30</sup>

As the preceding analysis illustrates, the bill is comprehensive in its scope and outlook. It seeks to amend five different Acts of Parliament with sophisticated provisions dealing with a range of legal issues including gender discrimination, domestic abuse and unlawful duress. Indeed while the focus of the bill is clearly the regulation of services provided by Shariah tribunals, it is not limited to this objective. The bill also contains provisions which address the plight of Muslim women more generally and which are unrelated to Shariah tribunals. The duty placed on public authorities in Part 2 for example clearly seeks to enhance the legal rights of Muslim women through education and awareness, while the provision on domestic abuse in Part 4 is a practical attempt to provide extra protection for Muslim women suffering from domestic abuse. The bill should thus be viewed as a comprehensive response to the plight of British Muslim women rather than simply an attempt to limit the jurisdiction of Shariah tribunals. This is the case with regards to the actual provisions of the bill, as well as the intensive public campaign which has accompanied the bill.

## **Support for the Bill**

In the process of promoting her bill, Baroness Cox has facilitated the publication of several reports which support the provisions of the bill.<sup>31</sup> One of these reports highlights the issues which British Muslim women face as a result of their marriage and makes no mention whatsoever of Shariah tribunals.<sup>32</sup> Two other reports on the other hand are direct responses to publications by the Islamic Shariah Tribunal which challenge the bill.<sup>33</sup> Baroness Cox has also garnered the support of a diverse array non-governmental organisations and public institutions hailing from a variety of religious, political and social backgrounds. Thus for example supporters of the bill include Christians, Muslims, Jews, secularists and feminists.<sup>34</sup> The bill has also received strong support from the media.<sup>35</sup> One of the main reasons the bill has been able to garner strong support from such a diverse array of groups is due to its comprehensive objective of protecting a vulnerable group within society, as opposed to a more limited objective of simply limiting the jurisdiction of Shariah tribunals.

## **The Bill's Rise and Fall in Parliament**

Alongside the support of the public, Baroness Cox crucially required the backing of the government for her bill to have any chance of passing through the parliamentary process. In the first year in which it was introduced, the bill did not even receive enough parliamentary time for a second reading, indicating from the outset that it did not have support from the government. This was confirmed in 2012, when the bill managed to receive a second reading for the first time and thus be subject to a debate in the House of Lords. The bill unsurprisingly received warm support from the majority of the house. The Lord Bishop of Manchester however expressed caution about the practicality of the bill's provisions, questioning whether the issues which the bill raised really needed fresh legislation.<sup>36</sup> Baroness Uddin, the only Muslim member of the house to contribute to the debate, also noted concern that the bill's particular focus on Shariah tribunals had led to the perception that it was "another assault on the Muslims".<sup>37</sup>

After listening to the all the contributions from the House, Lord Gardiner responded on behalf of the government. He praised the bill's noble objective of supporting the rights of women and ensuring all citizens enjoy the same rights. He noted however that the government had "reservations" about whether the bill was "the best way forward" in tackling the issues concerning British Muslim women. The first major objection which the government had about the bill was its prohibition of arbitration according to religious principles, something which the government stated the Arbitration Act specifically sought to facilitate:

"Couples, communities and other groups have the option to use arbitration and to apply religious considerations. For example, the Jewish Beth Din has long been recognised as able to conduct arbitrations applying Jewish law considerations. The Muslim Arbitration Tribunal, established in 2007, provides an alternative route to resolve civil law disputes in accordance with Sharia principles. In both cases this is because the Arbitration Act 1996 allows parties to an arbitration to agree any system of law or rules, other than national laws, to be applied by the arbitral tribunal. Crucially, both parties must freely have agreed to arbitration and to the use of religious principles. Even where religious law considerations have been applied to an arbitration, the resulting decisions are subject to review by the national courts on a number of grounds, including whether the agreement was freely

concluded."<sup>38</sup>

This is indeed a major shortcoming of the bill. If two parties are both genuinely happy to have their dispute arbitrated according to religious principles despite the discriminatory nature of such principles, the bill would still prohibit such arbitration. Such a prohibition conflicts with a central premise of the Arbitration Act, namely the freedom for two parties to have their dispute arbitrated according to any religious principles which they so wish.

The second major objection which the government had about the bill was that the issues which it sought to address were in fact already addressed by existing legislation. The Arbitration Act already stipulated that tribunals must act fairly and impartially, as well as stipulating that arbitration awards can be challenged in court if such a duty is breached or if there is any other irregularity.<sup>39</sup> The amendments made in Part 1 and 2 of the bill to the Equality Act and the Arbitration Act were therefore unnecessary.<sup>40</sup> The proposed amendments to the Family Law Act in Part 3 were also unnecessary as contracts are already deemed unenforceable in English contract law if made under duress.<sup>41</sup> Section 51 of the Criminal Justice and Public Order Act already made it an offence to intimidate victims of domestic violence, rendering the amendment suggested in Part 4 redundant.<sup>42</sup> Finally the new criminal offence suggested in part 5 was deemed unnecessary by the government because "Sharia councils and other religious councils have no jurisdiction in this country, therefore any decision they make can never be legally binding."<sup>43</sup> For these reasons Lord Gardiner concluded that "increased awareness requires changes to society, not changes to the law."<sup>44</sup> In this regard he noted that the government was already working with local bodies to increase awareness of the legal consequences of religious-only marriages, a matter which Part 2 of the bill had sought to address.

This stance of the government explains why the bill failed to receive a second reading in both 2013 and 2014. When it did manage to receive a second reading once again in 2015, the government adamantly maintained its position, stating:

"While we agree entirely with the noble Baroness that the necessary standards and safeguards must be in place, at the moment we do not agree that the law needs changing to facilitate this, because relevant and specific protections are already in place in common law and in existing legislation."<sup>45</sup>

This position was maintained despite some changes which Baroness Cox had made to the bill. These changes crucially included the removal of a clause which had stipulated that family law matters cannot be subject to arbitration proceedings.<sup>46</sup> The government also announced in this response some initiatives which it had recently undertaken to tackle the issue of domestic violence, including a new offence of "coercive or controlling behaviour" which had been inserted into the Serious Crime Act 2015 to ensure that "manipulative or controlling perpetrators who cause their loved ones to live in fear will face justice for their actions."<sup>47</sup> Despite the government's response, the bill managed to pass through the House of Lords, and received its first ever reading in the House of Commons on 11 February 2016. Unsurprisingly however, it failed to receive its second reading scheduled on 11 March 2016, terminating the bill's progress for the 2015-2016 parliament session.

## Shortcomings of the Bill and an Alternative Solution

Alongside the two shortcomings of the bill specifically pointed out by the government, there is also another major weakness which the bill suffers from which the government failed to note. This is the bill's assumption that the majority of Shariah tribunals operate under the Arbitration Act. As the government itself has affirmed, the truth is directly to the contrary.<sup>48</sup> Most tribunals do not operate at all under the Arbitration Act, since the vast majority of their work relates to Islamic divorce which is outside the remit of the Arbitration Act.<sup>49</sup> Those tribunals which do operate under the Arbitration Act do so in a very small minority of cases. The Muslim Arbitration Tribunal is an exception to this rule.

The bill is therefore "misplaced" in its focus on arbitration and mediation services, as Sandberg notes.<sup>50</sup> To bypass this shortcoming, Sandberg and Cranmer have drafted an alternative form of the bill which they suggest could regulate Shariah tribunals more appropriately.<sup>51</sup> Titled the "Non-Statutory Courts and Tribunals (Consent to Jurisdiction) Bill", this bill shifts the focus to concerns about the genuineness of consent in Shariah tribunals, which the authors believe is in fact the central issue related to Shariah tribunals.<sup>52</sup> Like Baroness Cox's bill, this bill also addresses concerns that Shariah tribunals illegally claim jurisdiction in criminal and family matters. To these ends the bill creates statutory offences for exercising judicial jurisdiction without a person's consent and for falsely claiming jurisdiction in matters of crime and in cases involving children. One note-worthy characteristic of this bill is that it incorporates the sophisticated framework of consent found in the Sexual Offences Act 2003 which provides a statutory definition of consent buttressed by the use of conclusive and rebuttable presumptions.<sup>53</sup>

Despite its valuable attempt to remedy a shortcoming in Baroness Cox's bill, this bill as it stands still suffers itself from various shortcomings. Qualitative studies of Shariah tribunal users have not highlighted consent as an issue which is empirically proven. On the contrary, such studies found that Muslim women were empowered by the services provided by the tribunals.<sup>54</sup> One of the main issues which such studies *did* highlight was the process of reconciliation administered by the tribunals, which were shown at times to cause unwarranted distress for the individuals involved. For this reason, a discourse on ways in which such procedures could be amended and improved would be much more pertinent and valuable. Moreover, one of the main functions of both Jewish and Islamic tribunals is to emancipate women who are purposefully chained in their marriage by oppressive husbands. This function necessarily involves the coercion of the husbands in many cases to cooperate in the proceedings. Such a bill may make tribunals reluctant to place pressure on their clients in such situations out of fear of prosecution. Oppressive husbands could also use the bill (once hypothetically enacted) to ensure their wives do not obtain the religious divorce which they desperately need by claiming they did not consent to the decision of the religious tribunal. As for the clauses concerning the claim of false legal jurisdiction in marital and criminal disputes, it is highly questionable whether these are necessary given the clear precedent that already exists in the law on the matter, as the government correctly pointed out in its response to Baroness Cox's bill.

To conclude, while Baroness Cox's bill may have strong public support, the unfortunate reality of the parliamentary process is that it needs the backing of the Government. Unless Cox can show government that her bill positively compliments existing legislation, it is

highly unlikely that she will succeed in making it law.

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<sup>1</sup> The bill is currently making its way through the House of Lords at the time of writing.

<sup>2</sup> For an in-depth discussion of private members' bills, see Peter Bromhead, *Private Members' Bills in the British Parliament* (Routledge 1956) and David Marsh and Melvyn Read, *Private Members' Bills* (Cambridge University Press 1988).

<sup>3</sup> Stephen Bailey et al., *The Modern English Legal System* (Fifth edition, Sweet and Maxwell 2011) 299.

<sup>4</sup> Hilaire Barnett, *Constitutional and Administrative Law* (Tenth edition, Routledge 2013) 312.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, 318.

<sup>7</sup> Bailey n(3) 299. Indeed if one member of parliament simply shouts *object* when the bill is read out for a scheduled reading, the bill can make no further progress. Government and opposition whips routinely block contentious private members' bills in this way, see House of Common Information Office, *Private Members' Bills Procedure* (House of Commons 2010) 6.

<sup>8</sup> Barnett n(4) 319.

<sup>9</sup> *Ibid.*

<sup>10</sup> This occurred in 2011 when the bill was first introduced, as well as in 2013 and 2014. In each of these years the bill only managed to receive a first reading (which is simply a formality, taking place without a debate) after which it lapsed when parliament was dissolved on each respective year, see <http://www.parliament.uk/business/bills-and-legislation/> accessed 05/03/2016.

<sup>11</sup> Lela Gilbert, *Baroness Cox: Eyewitness to a Broken World* (Monarch Books 2008) 7. For a brief biographical account of Baroness Cox explored in the context of the bill in question, see Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Ashgate 2015) 138-143, with a particular focus on Cox's political and religious views. For more in-depth biographical accounts, see Gilbert's biography as well as Andrew Boyd, *A Voice for the Voiceless* (Lion Books 1999).

<sup>12</sup> *Ibid.*, 9-10.

<sup>13</sup> Caroline Cox, *A Parallel World: Confronting the abuse of many Muslim women in Britain today* (The Bow Group 2015) 2.

<sup>14</sup> See HL Deb June 2008 c1184. For a detailed elaboration of her concerns about the rise of Islamic law in the West, see Caroline Cox and John Marks, *The West, Islam and Islamism: Is Ideological Islam Compatible with Liberal Democracy?* (Second edition, Institute for the Study of Civil Society 2006).

<sup>15</sup> Grillo n(11) 144. Cox also highlights these two factors in a report written to support the bill, stating "The issues outlined in this report address one central principle: there must be equality for all British citizens under a single law of the land. However, evidence suggests that the increasing influence of Sharia law in Britain today is undermining this basic principle. Urgent action is required. The rights of Muslim women, and the rule of law, must be upheld...The Bill is a step in the right direction. It is not the whole solution but it does seek to tackle some of the more flagrant injustices outlined in this report" see Cox n(13) 4.

<sup>16</sup> The Arbitration and Mediation Services (Equality) Bill, 1.

<sup>17</sup> Cox n(13) 6.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid*, 7.

<sup>20</sup> *Ibid*, 8.

<sup>21</sup> *Ibid*, 38.

<sup>22</sup> The Arbitration and Mediation Services (Equality) Bill, Part 1.

<sup>23</sup> Cox n(13) 9-10.

<sup>24</sup> The Arbitration and Mediation Services (Equality) Bill, Part 4, 2(1).

<sup>25</sup> Cox n(13) 38.

<sup>26</sup> *Ibid*, 39.

<sup>27</sup> *Ibid.*

<sup>28</sup> The Arbitration and Mediation Services (Equality) Bill, Part 5, 6(2).

<sup>29</sup> See Cox n(13) 39.

<sup>30</sup> *Ibid.*

<sup>31</sup> These reports are all available on the website officially created to promote the bill, see

<http://equalandfree.org/resources/> accessed 07/03/2016.

<sup>32</sup> Habiba Jaan, *Equal and Free? 50 Muslim Women's Experiences of Marriage in Britain Today* (Aurat 2014). The report contains a forward written by Baroness Cox.

<sup>33</sup> See Baroness Cox, *Addressing Objections from the Leyton Sharia Council* (2015) and Yisroel Greenberg, *Comparisons between Sharia courts and the Beth Din* (2015) both available at

<http://equalandfree.org/resources/> accessed 08/03/2013.

<sup>34</sup> See Grillo n(11) 143-226.

<sup>35</sup> *Ibid.* See also the bill's official website which has a section devoted to reporting the support which the bill and its campaign have both received from the media, <http://equalandfree.org/press/> accessed 07/03/2016.

<sup>36</sup> HL Deb October 2012 c1693.

<sup>37</sup> HL Deb October 2012 c1708.

<sup>38</sup> HL Deb October 2012 c1711.



<sup>39</sup> *Ibid*, c1712.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*, c1713.

<sup>45</sup> HL Deb October 2015 c903.

<sup>46</sup> This clause had interfered with the new family arbitration scheme which had been recently developed by leading practitioners in England and Wales to enable couples to resolve financial and property disputes with greater speed and confidentiality and less cost, a fact which Baroness Cox acknowledged herself in the first debate on the bill, see HL Deb October 2012 c1684.

<sup>47</sup> HL Deb October 2015 c905.

<sup>48</sup> Speaking on behalf of the government in the recent House of Lords second reading of the bill, Lord Keen of Elie stated "the evidence at this stage is that very few sharia councils will carry out arbitration, and then in only very limited circumstances" see HL Deb January 2017 c920

<sup>49</sup> See Mohamed Keshavjee, "Alternative Dispute Resolution in a Diasporic Muslim Community in the United Kingdom", (DPhil Thesis, University of London School of Oriental and African Studies, 2008).

<sup>50</sup> <http://www.lawandreligionuk.com/2015/07/12/reforming-religious-courts-a-comparison-of-two-bills/> accessed 07/03/2016.

<sup>51</sup> Russell Sandberg (ed), *Religion and Legal Pluralism* (Ashgate 2015) 269-278.

<sup>52</sup> *Ibid*, 273.

<sup>53</sup> *Ibid*, 269.

<sup>54</sup> See Sonia Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (The Nuffield Foundation, 2001) and Samia Bano, "Complexity, Difference and 'Muslim Personal Law': Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain" (DPhil thesis, University of Warwick, 2004).